No. 20,827

IN THE

United States Court of Appeals

For the Ninth Circuit

. B. & J. YOUNG'S SUPER MARKETS, INC., *Petitioner*

VS.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent NLRB admits that its order is based on its finding that petitioner violated the Act by "causing" Hob Nob to terminate its employees. (Brief for NLRB, p. 23.) This simplifies the issues. It recognizes that except as to Norma Newton, there was no allegation of discriminatory refusal by petitioner to hire, and the case was not tried on that theory. Decisions such as *Tidelands Marine Service,* 140 N.L.R.B. 288 (1962), cited by Intervenor Local 193, are therefore not in point. (Brief for Intervenor, p. 10.)

REPLY

I. A PURCHASER IS NOT REQUIRED TO BE A SUCCESSOR.

As discussed in its opening brief, petitioner contends that it was free to request Hob Nob to terminate

its employees so that petitioner could hire its own employees. (Brief for petitioner, pp. 13-15.) Petitioner may have been motivated by a desire to minimize the impact of unionization, but there is nothing illegal about that.

This is not to say that in hiring its employees, petitioner was free to discriminate against former Hob Nob employees because of their union membership, but that was not complained of and respondent has now admitted that it is not the basis of the order.

What respondent's theory amounts to is that a purchase of a unionized business *must* become the successor of the seller and can not order its affairs not to. Respondent offers no authority in support of its theory.

Intervenor Local 193 states in its brief (p. 10) that where "a purchaser-employer, to evade an existing collective bargaining agreement, requires the termination by the seller of all of its employees, that purchaser has caused the discriminatory discharge of the employees and is in violation of Section 8(a)(3) of the Act." The case cited following the statement, *Northern California Chapter AGC,* 119 N.L.R.B. 1026 (1955), does not support it. That case involved a work stoppage by a striking union to cause a general contractor to terminate its contract with a sub-contractor unless the sub-contractor required its employees to join the striking union.

In the instant case petitioner did not coerce Hob Nob in any way. Petitioner and Hob Nob entered

nto an arms-length business transaction. Sam Wahou, the president of U. S. Food Stores, Hob Nob's arent company, testified that he set a price and told ne two Young brothers to take it or leave it. (Tr. 42.) While there was an understanding that the oungs wanted to hire their own employees, it was ot a condition of the sale. (Tr. 252-253.)

Unless the purchaser of a unionized business must etain the employees of the seller, a proposition for hich there is no authority, respondent's Order for einstatement of the Hob Nob employees can not tand.

II. PETITIONER IS NOT A SUCCESSOR.

Obviously petitioner should not be required to barain with Local 193 unless petitioner is Hob Nob's uccessor within the meaning of the Act. It is meangless for respondent and Local 193 to argue that etitioner took action to evade its obligations as a uccessor unless petitioner had such obligations to egin with.

Both respondent and Local 193 cite numerous cases o establish that petitioner is Hob Nob's successor. Brief for NLRB, pp. 20-21; Brief for Intervenor, p. 4-5.) A careful review of each of those cases hows that they are cases in which the purchaser reained all or a substantial portion of the employees of he seller.

The question posed by the trial examiner, "Are you till a successor, although you have none of the em-

ployees of the predecessor?" (Tr. 410), is answered by this Court in *N.L.R.B. v. John Stepp's Friendly Ford, Inc.,* 338 F. 2d 833, 836 (C.A. 9, 1964):

> "The controlling question here, it would seem to us, is whether the new owner may rationally be said in substance, as to the unit in question, to have taken over and succeeded to his predecessor's employees. If he has not—if, on the contrary, he has within the unit in question secured his own employees—then he is not, as to the employees in question, a successor. He is their original employer. In such case both the employer and the employee unit are strangers to the certification and to the election upon which it was based. Nothing remains of the relationship to which the certification attached. Under such circumstances, in our judgment, the certification cannot stand."

Here, as in *Stepp's Friendly Ford,* there is no evidence of anything but an ordinary business transaction. There is nothing to suggest a sale by Hob Nob to an *alter-ego* in order to evade its agreement.

The cases cited by respondent and Local 193 are cases of certified unions. Local 193 was not certified. (Tr. 274-275.) Cf., *Brooks v. N.L.R.B.,* 348 U.S. 96, 75 S. Ct. 176 (1954).

Local 193 has never claimed to represent petitioner's present employees. The only claim Local 193 ever did make was that its collective bargaining agreement with Hob Nob or with Jack Young's Supermarket—it does not clearly appear which—was binding on petitioner. (Tr. 82-83, 90-91.)

II. THE FINDINGS OF INDIVIDUAL DISCRIMINATION AND SINGLE EMPLOYER: FACT OR FICTION?

Both respondent and Local 193 argue that the sales ecord for the Chester Street store, at which Jack Baldwin was employed, does not support petitioner's ntention that business was slow at the time he was ischarged. (Brief for NLRB, p. 20; Brief for Intervenor, p. 13.) The argument ignores the facts.

Baldwin was discharged on August 30, or August 1, 1964. (Tr. 157.) During the week ending August 3, 1964, the prior week, as shown by petitioner's Exhibit No. 7, both overall sales and sales at the Chester treet store were the lowest they had been for eight eeks. It does not appear from the record whether Villiam Young would have had before him the totals or the week ending August 31, 1964, at the time he alked with Baldwin, but if he had, there was not uch improvement. For the following week, that ending September 6, 1964, sales did not improve, but the ecord is silent as to Young's capacities as a seer.

There is pertinent language in *N.L.R.B. v. McMahey,* 233 F. 2d 406, 410, 412-413 (C.A. 5, 1956):

> "But the claim of an 8(a)(3) unlawful discharge of Ferguson, a shipping clerk, and Hollinger, a crane operator, stands quite differently. The finding of 8(a)(1) guilt does not automatically make a discharge an unlawful one or, by supplying a possible motive, allow the Board, without more, to conclude that the act of discharge was illegally inspired. Indeed, we have frequently sustained 8(a)(1) charges while rejecting those under 8(a)(3)."

* * * * * * *

"The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was excessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by a managerial consideration, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids."

* * * * * * *

"Rotation in personnel is a common thing. The employer does not enter the fray with the burden of explanation. With discharge of employees a normal, lawful legitimate exercise of the prerogative of free management in a free society, the fact of discharge creates no presumption, nor does it furnish the inference that an illegal—not a proper—motive was its cause. An unlawful purpose is not lightly to be inferred. In the choice between lawful and unlawful motives, the record taken as a whole must present a substan-

tial basis of believable evidence pointing toward the unlawful one."

See also,

N.L.R.B. v. Fox Mfg. Co., 238 F. 2d 211 (C.A. 5, 1956).

Here, the record as a whole does establish unlawful motive for the discharge of Baldwin. He was offered other employment so that he could observe a picket line (Tr. 154), was promoted a short time later (Tr. 87), and never engaged in union activities. The fact that while he was a "fairly decent meat cutter", he did not work out as a meat manager (Tr. 357), is unfortunate but does not begin to show that Baldwin was discharged because of union activity or membership.

As pointed out by petitioner in opening brief, while the case for Imogene Brewton turns on her testimony that she was requested to work at Jack Young's store on Brundage Lane so that Charlene Pappin, a Jack Young's employee, could take her place at petitioner's Wildale (Roberts Lane) store and thereby avoid having to become a union member, the record is clear that Pappin *did* join the union. (Tr. 384.) Respondent speaks of Pappin having "eventually joined" the union. (Brief for NLRB, p. 15.) This overlooks the fact that Pappin joined while employed at Jack Young's. She left Jack Young's *before* taking Brewton's place. (Tr. 397.)

Petitioner's reason for requesting Brewton to work at Jack Young's was to improve the efficiency of its

operation. (Tr. 305-306, 327, 336.) A desire to improve or maintain business efficiency is a reasonable one even where a picket line is involved. *N.L.R.B. v. L. G. Everist, Inc.,* 334 F. 2d 312 (C.A. 8, 1964).

Norma Newton is discussed in petitioner's opening brief. There is no need to refer to her again here except to reiterate the inherently improbable nature of the conversations claimed by her in her testimony.

As to the "single employer" aspect of this case, it is admitted that William Young, with his brother John Young, effectively controlled petitioner's labor relations. However, at Jack Young's, William Young was a minority shareholder and subordinate to his father, Jack Young. The essential link of common control is missing. *N.L.R.B. v. Red Rock Co.,* 187 F. 2d 76 (C.A. 5, 1951), *Gifford-Hill & Co.,* 90 NLRB 428 (1950).

Local 193 stresses there were "interchanges of employees" between petitioner and Jack Young's. (Brief for Intervenor, p. 14.) Examination of the record (Tr. 58, et seq.) shows that for the most part, those were employees union representative Hodson saw working at Jack Young's in April, 1964, and later at one of petitioner's stores. "Interchange" implies two way movement, not leaving one job for a new one and remaining on the new one.

The "interchange" argument is typical of the numerous factual distortions which appear in both respondent's and Local 193's briefs. For instance, Michelleti was not the union representative, but rather

ne of Hob Nob's executives, and he flatly denied aking the statement attributed to him. (Brief for LRB, p. 6; Tr. 272, 274.) Barnum found other mployment before the alleged call to his wife from Villiam Young, not after it. (Brief for NLRB, p. 8; r. 212.)

CONCLUSION

For the reasons set forth herein and in petitioner's pening brief, the NLRB Decision and Order should e reversed and set aside.

Dated, Coalinga, California,
September 20, 1966.

Respectfully submitted,
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Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation f this brief, I have examined Rules 18 and 19 of the Jnited States Court of Appeals for the Ninth Circuit, nd that, in my opinion, the foregoing brief is in full ompliance with those rules.

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